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No. 85-182

In the Supreme Court of the United States

October Term, 1985

NORTHWEST CENTRAL PIPELINE CORPORATION
and K N ENERGY, INC.,
Appellants,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO AFFIRM OR DISMISS

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QUESTIONS PRESENTED

1. Whether orders issued by the Kansas Corporation Commission amending the Basic Proration Order for the Hugoton Gas Field invade the exclusive jurisdiction of the Federal Energy Regulatory Commission.

2. Whether the orders amending the Basic Proration Order for the Hugoton Gas Field unconstitutionally burden interstate commerce.

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MOTION TO AFFIRM OR DISMISS

The Appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Kansas on the ground that the questions upon which the decision of the cause depend are so unsubstantial as to require no further argument.

STATEMENT OF THE CASE

A. Introduction

This appeal questions the authority of the Kansas Corporation Commission (Commission) to enter orders amending the Basic Proration Order for the Hugoton Gas Field.

The orders at issue were directed to producers of gas from this field and set forth how unproduced allowable (underage), which has been cancelled pursuant to the terms of the proration order, may be reinstated and produced.

B. Facts

The Commission accepts the recitation of the facts as set forth in the Appellants' Jurisdictional Statement with the following clarifications.

The Basic Proration Order for the Hugoton Field was issued by the Kansas Commission in 1944 to govern production from this enormous reservoir of gas. At various times the provisions of the Basic Order have been amended to reflect changes in field conditions or market demand. The provision at issue in this appeal, Paragraph (p), has been altered several times to accomodate changes in the field.

Twice each year the Commission considers the projected requirements of the pipelines connected to the field and allocates the demand for gas to the various wells. The objective of the basic order is to give each well the opportunity to produce its underlying reserves through a formula designed to cause a uniform reduction in pressures, consistent with current market demand.

Underages attributed to wells in the field accrue when the wells produce less than their current allowable. The fact that any particular well has accumulated significant underage simply indicates that its allowed production is not being purchased by the connected pipeline. Appellants state that since 1963 "huge" underages have developed as a result of the setting of market demand by the Commission. It must be pointed out that no appeal has been

taken in recent years of any market demand order relating to the Hugoton Field. The last reported case concerned with the Commission's market demand determinations for the Hugoton Field was *Colorado Interstate Gas Co. v. State Corporation Commission,* 192 Kan. 1, 386 P. 2d 266 (1963), *cert. denied,* 379 U.S. 131 (1964).

The Commission in 1982 instituted an investigation of the Basic Order to ascertain if changes should be made because of the amounts of underage which were accumulating to some wells. Paragraph (p) of the Basic Order prescribes the amounts of overproduction which may occur before a well is shut-in, or underproduction which can accumulate before cancellation.

The evidence of all parties at the hearing was in agreement on two points. First, the deliverability formula utilized in the Basic Order is the best method for regulating production from the Hugoton Field. Second, the witnesses agreed that the only solution to the underage problem was increased production from the underproduced wells. There was substantial competent evidence that the situation at that time was causing the violation of correlative rights through the drainage of gas toward wells with higher levels of current production. The disagreement at the hearing centered on how the Commission could best amend Paragraph (p), if at all, to adddress the problems created by large accumulations of underage while pursuing its statutory duty under K.S.A. 55-703 of regulating gas production in an equitable, nonwasteful fashion that will satisfy market demands.

The orders amending Paragraph (p) set forth reasonable time periods under which cancelled underage must be reinstated and produced. When underage attributed to most of the field's wells exceeds six times the January

current allowable, typically the largest monthly allowable, it is cancelled. The producer has three years after the cancellation date to request reinstatement once the well reaches an overproduced status. The reinstated underage must be produced within five years or it is permanently cancelled. The District Court of Gray County, Kansas, and the Kansas Supreme Court, in reviewing these orders, concluded they were lawful and reasonable and affirmed the Commission's actions. These courts noted that the orders were aimed solely at producers and were related to the production and gathering of gas, an area wholly within the province of the state. The permanent cancellation of some unproduced allowable *may* have an effect upon the purchases of connected interstate pipelines. The Commission submits that this indirect effect of the orders at issue is not a substantial federal question that should trigger the jurisdiction of this Court.

ARGUMENTS IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

1. The Amendment to Paragraph (p) Does Not Invade the Exclusive Jurisdiction of the Federal Energy Regulatory Commission.

The Basic Proration Order for the Kansas portion of the Hugoton Field was adopted to regulate the production of gas from this reservoir. This type of state regulation is clearly proper under the Natural Gas Act which exempts from federal jurisdiction "the production or gathering of natural gas." 15 U.S.C. § 717(b). The record developed before the Commission indicated that the correlative rights of producers in this field were being violated by the migration of gas from underproduced wells to wells which were producing their allowables (R. Vol. 9, p. 56). The

administrative record also reflected that Paragraph (p), which then permitted reinstatement of cancelled underage without any time limitations, gave producers no incentive to timely produce their allowables (R. Vol. 9, p. 23). The orders amending Paragraph (p) promulgated time restrictions on the production of gas and were directed solely to producers in the Hugoton Field. Production of gas means the act of bringing gas from the earth and gathering means the act of collecting gas after it has been brought forth. *FPC v. Panhandle Eastern Pipeline Co.*, 337 U.S. 518 (1949). The orders at issue in this appeal lie outside the jurisdiction of the federal government.

The Commission was carrying out traditional state functions over the production of gas when amending Paragraph (p). The production and transportation of gas is a continuous process and regulations regarding the production of gas dedicated to interstate commerce will necessarily impact upon the interstate flow of gas. This Court has long recognized this reality and enunciated when state regulation reaches too far. In *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84 (1963) it was stated:

> [O]ur cases have consistently recognized a significant distinction, which bears directly upon the constitutional consequences, between conservation measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at producers and production. The former cannot be sustained when they threaten as here, the achievement of the comprehensive scheme of federal regulation. 372 U.S. at 94.

The appellants contend that the orders amending Paragraph (p), although directed at producers, will have an effect on interstate purchasers so broad as to transcend Constitutional limitations. The *Northern Natural* decision

defines when state action is preempted by federal authority. The orders on appeal here are a proper exercise of the state police power when measured by the test of *Northern Natural.*

2. The Amendment to Paragraph (p) Does Not Constitute an Impermissible Burden Upon Interstate Commerce.

As previously discussed in this Motion, the orders amending Paragraph (p) were intended to prevent continued correlative rights violations in the Hugoton Gas Field. The appellants argue that by pursuing this legitimate state concern the Commission was engaging in economic protectionism. The orders at issue were designed to prevent undue drainage to wells through the production of allowables in a more timely fashion. These orders were directed uniformly to all producers in the Hugoton Field and were not intended to favor any particular group of wells, whether dedicated to the interstate or the intrastate market. Evenhanded state regulation to effectuate a legitimate public interest with incidental effects on interstate commerce will be upheld unless the burden imposed is excessive in relation to the putative local benefits. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission,* 461 U.S. 375 (1983). The legitimate public interest is gas production in a manner which protects correlative rights.

Each producer has been assigned allowables in an evenhanded manner, the opportunity of each to produce is the same, and the failure to produce by any or all results in allowable cancellation in a known and equal manner. The alleged burden on interstate commerce, if such an impediment ever comes to pass, will be that the pipeline will not be able to purchase underage that has been per-

manently cancelled. There will be current allowable and presumably, in many cases, accumulated underage that can be purchased from each well to permit the pipeline to meet its obligations. The orders at issue are not violative of the Commerce Clause and do not warrant review by this Court.

3. This Court's Decision in Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board Will Have No Bearing on This Appeal.

The issue of whether a state commission can direct an interstate pipeline to purchase and to ratably take deregulated natural gas from a common source of supply is before this Court in *Transcontinental Gas Pipeline Corporation v. State Oil and Gas Board of Mississippi,* No. 84-1076, *prob. juris. noted,* 85 L. Ed. 2d 140 (March 25, 1985). The *Transco* case involves an administrative order directed to an interstate pipeline. That pipeline, unquestionably subject to the FERC's jurisdiction, contends that the State of Mississippi entered an area preempted by the federal government pursuant to the Natural Gas Act, 15 U.S.C. § 717, *et seq.,* as amended by the Natural Gas Policy Act, 15 U.S.C. § 3301, *et seq.*

Transco, is distinguishable from the instant appeal. The orders amending Paragraph (p) placed no obligation on any interstate pipeline. Those orders were directed at producers and involve entirely different questions than those raised in the *Transco* case. The Kansas Supreme Court noted that under the *Northern Natural* case "the matter of allowables must be construed to pertain to production. The state has regulatory authority over production." (Appellants' Appendix A, 29a). This conclusion is correct, distinguishable from the *Transco* case and should be summarily affirmed by this Court.

CONCLUSION

Appellants' Jurisdictional Statement does not raise a substantial federal question. At issue in this appeal are administrative orders pertaining to the production of natural gas, a traditional state function. These orders do not impinge upon federal authority nor do they create an undue burden on interstate commerce. This appeal should be dismissed and the state court's decision affirmed in all respects.

Respectfully submitted,

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